



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 20, 1997

Mr. T. Beck Gipson
Vice-President, Board of Directors
Upper Guadalupe River Authority
P.O. Box 1278
Kerrville, Texas 78029-1278

Letter Opinion No. 97-028

Re: Whether Government Code chapter 573.041(2) precludes the Upper Guadalupe River Authority from retaining as local counsel a law firm in which the brother of a river authority board member is a shareholder and related question (ID# 38726)

Dear Mr. Gipson:

Government Code section 573.041(2) prohibits a state or local board from appointing an individual who is related to one of the board members within the third degree by consanguinity. Although this nepotism prohibition applies to the hiring of an independent contractor, it applies only to the hiring of individuals, not corporations. You ask whether section 573.041 precludes the Upper Guadalupe River Authority from retaining a law firm in which the brother of one of the authority board members is a shareholder. You further ask whether Local Government Code section 171.004, which requires a local public official with a substantial interest in a business entity to abstain from participating in a vote on a matter affecting the business entity in certain circumstances, requires the board member-brother to abstain from participating in the decision to retain the law firm.

Because a law firm is not an individual, we conclude that Government Code section 573.041 does not apply. We further conclude that Local Government Code section 171.004 does not apply because the board member does not have a substantial interest, for purposes of chapter 171, in his brother's law firm solely by virtue of the familial relationship. We therefore believe the Upper Guadalupe River Authority may retain a law firm in which one of the shareholders is a brother to one of the river authority's board members.

You indicate that the board of directors of the Upper Guadalupe River Authority (the "river authority") desires to retain local counsel on an annual basis, which the board feels will be more cost-effective than engaging counsel on a case-by-case basis. Accordingly, you state, the board requested proposals or expressions of interest from lawyers and law firms within Kerr County. Among the law firms that responded to the board's request is Wallace, Mosty, MacHann, Jackson & Williams ("Wallace, Mosty"), which you state is a professional corporation. Following an interview with representatives

of Wallace, Mosty, as well as other firms and lawyers, you state that the board believes Wallace, Mosty "is probably the most qualified to serve as local counsel." The board has not, as yet, finally acted to select local counsel.

Mr. Richard Mosty, a shareholder in the law firm the board would like to retain, is a brother of the board president of the river authority, Mr. John Mosty. You therefore ask whether the river authority legally may retain Wallace, Mosty as its local counsel, and, if it may, whether Mr. John Mosty may participate in the decision.¹ We preliminarily note that the river authority is a conservation and reclamation district established in accordance with article XVI, section 59 of the Texas Constitution.² The river authority is a governmental agency whose boundaries are coextensive with Kerr County.³

Because nothing in the river authority's special laws resolve the issue about which you ask, we look to general state law. You particularly refer to the nepotism statutes and the conflict-of-interest provisions governing local government officials. You suggest that the nepotism statutes, found in Government Code chapter 573, may dictate whether the river authority may retain Wallace, Mosty.

Government Code section 573.041(2) prohibits a state or local board from appointing an "individual" who is related to a member of the board within the third degree by consanguinity.⁴ An individual and his or her brother are relatives in the second degree by consanguinity.⁵ By its terms, the nepotism prohibition applies only to the appointment of an individual, which is distinct from a corporation.⁶ Indeed, in Attorney General Opinion DM-76 this office stated that the nepotism law applies only to the hiring of

¹You letter informs us that, thus far, Mr. John Mosty has abstained from the discussion and decision-making process with regard to the selection of local counsel.

²See Act of May 26, 1983, 68th Leg., R.S., ch. 1059, § 1, 1983 Tex. Gen. Laws 5612, 5613.

³See Act of May 26, 1965, 59th Leg., R.S., ch. 632, sec. 1, §§ 1, 2, 1965 Tex. Gen. Laws 1439, 1439.

⁴See also Gov't Code § 573.002 (defining relationships to which chapter 573 applies).

⁵*Id.* § 573.023(c)(2).

⁶See BLACK'S LAW DICTIONARY 696 (5th ed. 1979); BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 291 (1987).

"natural persons."⁷ Because Wallace, Mosty is a corporation, Government Code section 573.041 is inapplicable, and the river authority may retain the firm as local counsel.⁸

We therefore proceed to consider whether, in accordance with Local Government Code section 171.004, Mr. John Mosty must abstain from participating in the board's decision to retain Wallace, Mosty. Section 171.004(a) requires a "local public official," prior to the governmental entity's vote on a matter affecting a business entity in which the official has a "substantial interest," to file an affidavit stating the nature and extent of the official's interest. Moreover, in certain situations, the official must abstain from participating further in the matter.⁹

A director of an authority created under article XVI, section 59 of the Texas Constitution, such as the river authority, is a local public official for purposes of Local Government Code chapter 171.¹⁰ Consequently, we must determine whether the river authority's board member has a "substantial interest" in his brother's law firm by virtue of the familial relationship. Under Local Government Code section 171.002(a), a local public official has a "substantial interest" in a business entity if the official either owns at least ten percent of the entity or received at least ten percent of the official's gross income for the previous year from the entity. Additionally, a local public official has a substantial interest in a business entity "if a person related to the official in the first degree by consanguinity . . . has a substantial interest under this section."¹¹ To determine the degree of relationship under chapter 171, the statute directs us to apply the definitions in Government Code chapter 573, the nepotism provisions. Under Government Code chapter 573, of course, the two brothers are relatives in the second degree by consanguinity.¹² Thus, Mr. John Mosty does not have substantial interest in his brother's

⁷Attorney General Opinion DM-76 (1992) at 2 (citing *Lewis v. Hillsboro Roller-Mill Co.*, 23 S.W. 338, 338 (Tex. Civ. App. 1893, no writ)).

⁸You have presented no evidence that Wallace, Mosty is simply an alter ego of Mr. Richard Mosty. See *id.* at 3 n.2. We note that a shareholder of a professional corporation may be liable to a client if the shareholder committed the error or omission that is the subject of the client's complaint. See V.T.C.S. art. 1528e, § 16. This fact alone does not warrant a conclusion that a professional corporation is an individual for purposes of Government Code section 573.041(2). But, as a consequence of the attorney Mr. Mosty's potential liability to the River Authority, the board may wish to require that Wallace, Mosty prohibit him from any contact with the River Authority's work.

⁹Local Gov't Code § 171.004(a).

¹⁰See Water Code § 49.058.

¹¹Local Gov't Code § 171.002(c).

¹²See *supra* note 5 and accompanying text.

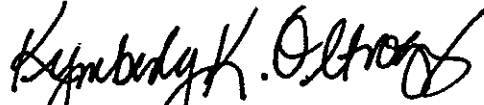
law firm solely by virtue of their kinship.¹³ Accordingly, Local Government Code section 171.004 is inapplicable.

S U M M A R Y

Government Code chapter 573 does not prohibit the Upper Guadalupe River Authority from retaining as local counsel a law firm in which one of the shareholders is a brother of a member of the river authority's board.

For purposes of Local Government Code chapter 171, a local public official does not have a substantial interest in a law firm in which the official's brother is a shareholder solely by virtue of the kinship. The local public official therefore need not comply with section 171.004.

Yours very truly,



Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee

¹³You do not allege that Mr. John Mosty owns ten percent of Wallace, Mosty or that last year he received at least ten percent of his gross income from Wallace, Mosty.